Source: http://scc.lexum.umontreal.ca/en/2003/2003scc8/2003scc8.html

Canada (Information Commissioner) *v.* Canada (Commissioner of the Royal Canadian Mounted Police), [2003] 1 S.C.R. 66, 2003 SCC 8

Information Commissioner of Canada *Appellant*

v.

Commissioner of the Royal Canadian Mounted Police *Respondent*

and

Privacy Commissioner of Canada *Intervener*

Indexed as: Canada (Information Commissioner) *v.* Canada (Commissioner of the Royal Canadian Mounted Police)

Neutral citation: 2003 SCC 8.

File No.: 28601.

2002: October 29; 2003: March 6.

Present: McLachlin C.J. and Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel and Deschamps JJ.

on appeal from the federal court of appeal

Access to information — Privacy — Personal information — Exception — Position or functions of individual — Request made for information concerning four members of RCMP under Access to Information Act — Whether requested information constitutes "personal information" as defined in s. 3 of Privacy Act — If so, whether information should be disclosed because it falls within "position or functions of the individual" exception — Access to Information Act, R.S.C. 1985, c. A-1, s. 19(1) — Privacy Act, R.S.C. 1985, c. P-21, s. 3 "personal information" (b), "personal information" (j).

An individual requested certain information from the RCMP pertaining to four of its officers. The RCMP refused to disclose the information on the grounds that the records contained "personal information", as defined by s. 3 of the *Privacy Act*, and therefore were exempt from disclosure pursuant to s. 19(1) of the *Access to Information Act*. A complaint was made to the Information Commissioner, who undertook an investigation. During that investigation, the RCMP informed the Information Commissioner that it would release the current postings and positions of the four serving RCMP members and the last posting and position of the one retired RCMP member. However, the RCMP maintained its position that the remaining information was "personal information" and thus exempt from the disclosure requirements. The Information Commissioner found that the information relating to the previous RCMP postings of the four officers, as well as certain other job-related information contained in the relevant records, did not constitute "personal information". He recommended that the RCMP disclose the list of the officers' historical postings, their status and date; the list of ranks and the dates they achieved those ranks; their years of service; and their anniversary date of service. The RCMP indicated that it would not follow the Information Commissioner's recommendation. The Information Commissioner applied to the Federal Court, Trial Division, for an order directing the RCMP to disclose the records or portions thereof which do not qualify for exemption from disclosure under s. 19(1) of the *Access to Information Act*. The Trial Division held that only information related to a public servant's current position or a former public servant's last position needed to be released. The Federal Court of Appeal upheld that decision.

Held: The appeal should be allowed.

The RCMP Commissioner should be ordered to disclose the list of the RCMP members' historical postings, their status and date; the list of ranks and the dates they achieved those ranks; their years of service; and their anniversary dates of service. These are all elements that relate to the general characteristics associated with the position or functions of an RCMP member. They do not reveal anything about their competence or divulge any personal opinion given outside the course of employment — rather, they provide information relevant to understanding the functions they perform.

In this case, application of the functional and pragmatic approach indicates that deference to the RCMP Commissioner would be unjustified and his decision ought to be reviewed on a standard of correctness. The information sought regarding the four RCMP members is "information about an identifiable individual", and therefore "personal information" within the meaning of s. 3 of the *Privacy Act*. There is also no doubt that the requested information relates to employment history and falls within the scope of s. 3 "personal information" (*b*). The information requested is exactly the type of information that a reasonable person in a working environment would likely characterize as employment history. However, the information falls under the exemption provided in s. 3 "personal information" (*j*) of the *Privacy Act*. Section 3(*j*) is retroactive in nature and there is no reason to impose a time restriction on its scope. The list of examples provided in s. 3(*j*) is not exhaustive and certainly does not limit the application of the introductory paragraph to the current position held by an employee or to the last position occupied by an employee now retired. Nevertheless, s. 3(*j*) does have a specified scope, as the information must be related to the position or functions held by a federal employee. This will exclude information relating, for example, to the competence and characteristics of the employee. Section 3(*j*) should apply only when the information requested is sufficiently related to the general characteristics associated with the positions or functions held by an officer or employee of a federal institution. It is both artificial and unhelpful to attempt to distinguish between "information about the person" and "information about the position or functions". Section 3(j) applies when the information — which is always linked to the individual — is directly related to the general characteristics associated with the position or functions held by an employee, without the objective or subjective nature of that information being determinative.

Cases Cited

Applied: *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403; **referred to:** *U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982; *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748; *Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71; *3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 F.C. 421, 2001 FCA 254; *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53; *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551.

Statutes and Regulations Cited

Access to Information Act, R.S.C. 1985, c. A-1, ss. 2(1), 4(1), 19, 41, 42, 48, 49.

Privacy Act, R.S.C. 1985, c. P-21, ss. 2, 3 "personal information" (*b*), "personal information" (*j*), 8(2)

(*m*)(i).

Authors Cited

Black's Law Dictionary, 6th ed. St. Paul, Minn.: West Publishing Co., 1990, "relate".

Reid, Hubert. *Dictionnaire de droit québécois et canadien avec table des abréviations et lexique anglais-français*, 2e éd. Montréal: Wilson & Lafleur, 2001, "relatif".

APPEAL from a judgment of the Federal Court of Appeal, [2001] 3 F.C. 70, 199 D.L.R. (4th) 309, 267 N.R. 163, 29 Admin. L.R. (3d) 193, 11 C.P.R. (4th) 336, [2001] F.C.J. No. 344 (QL), 2001 FCA 56, dismissing the appellant's appeal from a decision of the Trial Division (1999), 179 F.T.R. 75, 29 Admin. L.R. (3d) 177, [1999] F.C.J. No. 1860 (QL). Appeal allowed.

Clayton Ruby and *Daniel Brunet*, for the appellant.

Brian J. Saunders and *Christopher Rupar*, for the respondent.

Dougald E. Brown and *Steven Welchner*, for the intervener.

The judgment of the Court was delivered by

1 GONTHIER J. — This case concerns the application and interaction of the *Access to Information Act*, R.S.C. 1985, c. A-1 (the "*Access Act*"), and the *Privacy Act*, R.S.C. 1985, c. P-21, as they relate to a request for information pertaining to four members of the Royal Canadian Mounted Police ("RCMP"). More precisely, the question is whether the requested information relates to the position or functions of the individuals, and is therefore excluded from the ambit of s. 19(1) of the *Access Act*.

I. Factual Background

2 On June 4, 1998, Gordon Ronalds requested from the RCMP the following information regarding four RCMP members:

> List of communities of postings, including dates, occupied by the following Royal Canadian Mounted Police officers:
>
> (1) Cst/Acting Corporal Robert Shedden, Wells Detachment, BC;
>
> (2) S/Sgt Kenneth Craig, NCO, Quesnel Detachment, BC;
>
> (3) Corporal Bob Zimmerman, Quesnel Detachment, BC; and
>
> (4) S/Sgt Larry Ronald Wendell, Advisory NCO North Division, Williams Lake.
>
> Copies of all public complaints filed against each of the above individuals;
>
> and
>
> Name and address for service of member or former member who served as NCO IC/Royal Canadian Mounted Police detachment Baddeck, Nova Scotia in August 1986.

3 Mr. Ronalds sought this information in connection with litigation against the officers. The RCMP refused to disclose the information on the grounds that the records contained "personal information", as defined by s. 3 of the *Privacy Act*, and therefore were exempt from disclosure pursuant to s. 19(1) of the *Access Act*.

4 Upon receipt of written notice of this decision, Mr. Ronalds made a complaint to the Information Commissioner. The RCMP was duly notified of the complaint and the intention of the Office of the Information Commissioner to undertake an investigation. During the course of that investigation, the RCMP Commissioner informed the Information Commissioner that he would release the current postings and positions of the four serving RCMP members and the last posting and position of the one retired RCMP member. However, the RCMP maintained its position that the remaining information was "personal information" and thus exempt from the disclosure requirements.

5 On January 21, 1999, the Information Commissioner found that the information relating to the previous RCMP postings of the four officers, as well as certain other job-related information contained in the relevant records, did not constitute "personal information". He recommended that the RCMP disclose:

a) the list of historical postings, their status and date;

b) the list of ranks and the dates they achieved those ranks;

c) their years of service; and

d) their anniversary date of service.

On February 12, 1999, the RCMP indicated that it would not follow the Information Commissioner's recommendation.

6 On April 9, 1999, the Information Commissioner applied to the Federal Court, Trial Division, with the consent of Mr. Ronalds, for a review of the RCMP Commissioner's decision to refuse disclosure. The applicant sought an order directing the RCMP to disclose to Mr. Ronalds the records or portions thereof which do not qualify for exemption from disclosure under s. 19(1) of the *Access Act*. The Trial Division held that only information related to a public servant's current position or a former public servant's last position needed to be released. The Federal Court of Appeal dismissed the appeal.

II. Applicable Legislation

7 *Access to Information Act*, R.S.C. 1985, c. A-1

2. (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in

accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

4. (1) Subject to this Act, but notwithstanding any other Act of Parliament, every person who is

(*a*) a Canadian citizen, or

(*b*) a permanent resident within the meaning of the *Immigration Act*,

has a right to and shall, on request, be given access to any record under the control of a government institution.

19. (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the *Privacy Act*.

(2) The head of a government institution may disclose any record requested under this Act that contains personal information if

(*a*) the individual to whom it relates consents to the disclosure;

(*b*) the information is publicly available; or

(*c*) the disclosure is in accordance with section 8 of the *Privacy Act*.

42. (1) The Information Commissioner may

(*a*) apply to the Court, within the time limits prescribed by section 41, for a review of any refusal to disclose a record requested under this Act or a part thereof in respect of which an investigation has been carried out by the Information Commissioner, if the Commissioner has the consent of the person who requested access to the record;

(*b*) appear before the Court on behalf of any person who has applied for a review under section 41; or

(*c*) with leave of the Court, appear as a party to any review applied for under section 41 or 44.

(2) Where the Information Commissioner makes an application under paragraph (1)(*a*) for a review of a refusal to disclose a record requested under this Act or a part thereof, the person who requested access to the record may appear as a party to the review.

48. In any proceedings before the Court arising from an application under section 41 or 42, the burden of establishing that the head of a government institution is authorized to refuse to disclose a record requested under this Act or a part thereof shall be on the government institution concerned.

49. Where the head of a government institution refuses to disclose a record requested under this Act or a part thereof on the basis of a provision of this Act not referred to in section 50, the Court shall, if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof, order the head of the institution to disclose the record or part thereof, subject to such conditions as the Court deems appropriate, to the person who requested access to the record, or shall make such other order as the Court deems appropriate.

Privacy Act, R.S.C. 1985, c. P-21

> **2.** The purpose of this Act is to extend the present laws of Canada that protect the privacy of individuals with respect to personal information about themselves held by a government institution and that provide individuals with a right of access to that information.

"Personal information" is defined by s. 3 of the *Privacy Act*. It reads:

> **3.** . . .
>
> "personal information" means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,
>
> . . .
>
> (*b*) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> . . .
>
> but, for the purposes of sections 7, 8 and 26 and section 19 of the *Access to Information Act*, does not include
>
> (*j*) information about an individual who is or was an officer or employee of a

government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

8. (1) . . .

(2) Subject to any other Act of Parliament, personal information under the control of a government institution may be disclosed

. . .

(*m*) for any purpose where, in the opinion of the head of the institution,

(i) the public interest in disclosure clearly outweighs any invasion of privacy that could result from the disclosure, . . .

III. Judicial History

A. *Federal Court of Canada, Trial Division* (1999), 179 F.T.R. 75

8 Cullen J. began by emphasizing the fact that determining the scope of s. 3 "personal information" (*j*) (hereinafter s. 3(*j*)) requires the court to take into account the purposes of both the *Access Act* and the *Privacy Act*. After careful consideration and balancing of the respective interests protected by each enactment, Cullen J. held that the general nature of s. 3(*j*) is not retrospective. The fact that public servants abandon certain privacy rights upon taking up their positions cannot result in a wholesale surrender of all rights to privacy in respect of employment history; were s. 3(*j*) given a retrospective bearing, "there would be little left to contemplate in private and little meaning to the protection of employment history" (para. 24) given by s. 3 "personal information" (*b*) (hereinafter s. 3 (*b*)). Cullen J. therefore concluded that paras. (*j*)(i) to (iii) of s. 3 apply only to a public servant's current position or to the position last held by a former public servant.

9 Cullen J. also found that the respondent did not consider whether the information might properly have been disclosed under s. 8(2)(*m*)(i) of the *Privacy Act*, and that the respondent thereby failed in its exercise of the discretion it is required to exercise under s. 19(2) of the *Access Act*. Cullen J. therefore ordered the respondent to consider whether the information ought to be released in accordance with s. 8(2)(*m*)(i) of the *Privacy Act*.

B. *Federal Court of Appeal*, [2001] 3 F.C. 70, 2001 FCA 56

10 Létourneau J.A., for the court, held that s. 3(*j*) should be construed in a way that does not allow for the disclosure of an individual's "employment history". Owing to the fact that individual privacy is a fundamental right which has attracted constitutional protection, it would be improper to give s. 3(*j*) such breadth as to empty the definition of "personal information" of its contents with respect to "employment history". However, Létourneau J.A. ultimately held that s. 3(*j*) does authorize the release of information about an individual's position, whether current or past; neither the purpose nor the wording of s. 3(*j*) or s. 3(*j*)(i) requires an interpretation that would restrict their application to current positions. In his view, "[t]he very fact of employment, past or present, can be revealed and, indeed, is essential to a citizen in determining whether his request for disclosure is addressed to the appropriate authority and is worth pursuing" (para. 21).

11 However, Létourneau J.A. did emphasize at para. 22 that "a request about a named individual's position, especially in respect of the past positions held, has to be specific as to time, scope and place. It cannot be a fishing expedition about all or numerous positions occupied by an individual . . . over the span of his [or her] employment". Therefore, a citizen could properly ask whether John Doe worked for the Department of Justice in 1994, what position he held, what the duties and responsibilities of that position were, and where he exercised his function. He could not, however, request information about John Doe's positions in the government between 1980 and 1994.

12 Applying these principles to the request in the present case, Létourneau J.A. concluded that the demand, when assessed in its totality and in relation to its primary focus, was for specific individuals' employment histories, and not information about a current or a specific past position. The Federal Court of Appeal thus dismissed the appeal with costs to the respondent.

IV. Issues

13 There are two issues to be decided in this appeal:

1. Does the information that the appellant has requested constitute "personal information" as defined in s. 3 of the *Privacy Act*?

2. If so, does the information fall within the exception set out in s. 3(*j*) of the *Privacy Act*?

V. Analysis

A. *Standard of Review*

14 Before analysing the decision of the RCMP Commissioner, it is necessary to determine the appropriate standard of review. The central inquiry in determining the standard of review concerns the intention of the legislature, the discerning of which requires the Court to apply the functional and pragmatic approach (*U.E.S., Local 298 v. Bibeault*, [1988] 2 S.C.R. 1048; *Pezim v. British Columbia (Superintendent of Brokers)*, [1994] 2 S.C.R. 557; and *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] 1 S.C.R. 982). This approach — the appropriateness of which has been repeatedly affirmed by this Court — requires the court to take four factors into account: the presence or

absence of a privative clause or statutory right of appeal; the expertise of the tribunal relative to that of the reviewing judge; the purpose of the legislation; and the nature of the question before the tribunal.

15 Applying this approach to the case at hand, it must be noted at the outset that the *Access Act* does not contain a privative clause. Rather, s. 41 provides a process by which a person who has been refused access to a record may apply to the Federal Court for a review of that decision. Section 42 provides a mechanism by which the Information Commissioner may apply to the court, with the consent of the applicant, for a review of that decision, and s. 49 provides that the Federal Court may order the head of the institution to disclose the record requested, "if it determines that the head of the institution is not authorized to refuse to disclose the record or part thereof" (emphasis added). It also is noteworthy that s. 2(1) indicates that it is a purpose of the *Access Act* to ensure that "decisions on the disclosure of government information should be reviewed independently of government". The absence of a privative clause is not determinative by itself (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748). However, that factor, in conjunction with the explicit provision for the court to review refusals, and the importance ascribed by the *Access Act* to independent review, are indicative of a Parliamentary intention that the court have broad powers of review.

16 Also indicative of the appropriate standard of review is the fact that the finding under review is the Commissioner of the RCMP's interpretation of the *Access Act* and the *Privacy Act*. Relative to a reviewing judge, the Commissioner has no expertise in statutory interpretation. This fact further invites the application of broad powers of review.

17 The purpose of the *Access Act* is set out in s. 2(1) in the following terms:

> **2.** (1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

In my opinion, this purpose is advanced by adopting a less deferential standard of review. Under the federal scheme, those responsible for answering access to information requests are agents of a government institution. This is unlike the situation under many provincial access to information statutes, where information requests are reviewed by an administrative tribunal independent from the executive (*Macdonell v. Quebec (Commission d'accès à l'information)*, [2002] 3 S.C.R. 661, 2002 SCC 71). A less deferential standard of review thus advances the stated objective that decisions on the disclosure of government information be reviewed independently of government. Further, those charged

with responding to requests under the federal *Access Act* might be inclined to interpret the exceptions to information disclosure in a liberal manner so as to favour their institution (*3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 F.C. 421, 2001 FCA 254, at para. 30). As such, the exercise of broad powers of review would also advance the stated purpose of providing a right of access to information in records under the control of a government institution in accordance with the principle that necessary exceptions to the right of access should be limited and specific.

18 Finally, the nature of the issue before the Court also militates in favour of providing broad powers of review. The dispute requires the RCMP Commissioner to interpret s. 3(*j*), and in particular, the statement that personal information does not include "information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual . . .". Thus, the Commissioner is called upon to interpret the *Access Act* and the *Privacy Act*, taking into account the general principles underlying them. This is a question of law that does not turn on any finding of fact. It is also a question of a highly generalized nature, owing to the fact that the *Access Act* and the *Privacy Act* determine the disclosure obligations for each of the many institutions governed by the *Access Act*. These factors further indicate that courts ought not to be restrained in reviewing the Commissioner's decisions.

19 Considering the factors discussed above, and particularly the nature of the issue before the RCMP Commissioner and the absence of a privative clause, I am of the view that Parliament did not intend to leave the interpretation of s. 3(*j*) to the RCMP Commissioner. In this context, deference to the RCMP Commissioner would be unjustified, and courts ought to review his decision on a standard of correctness. Such a conclusion is also consistent with this Court's decision in *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 107, where La Forest J. dissenting, but not on this point, described s. 49 of the *Access Act* as authorizing the court to substitute its opinion where the head of the government institution is not authorized to refuse disclosure:

> It is clear that in making this determination, the reviewing court may substitute its opinion for that of the head of the government institution. The situation changes, however, once it is determined that the head of the institution is authorized to refuse disclosure. Section 19(1) of the *Access to Information Act* states that, subject to s. 19(2), the head of the institution shall refuse to disclose personal information. Section 49 of the *Access to Information Act*, then, only permits the court to overturn the decision of the head of the institution where that person is "not authorized" to withhold a record. Where, as in the present case, the requested record constitutes personal information, the head of the institution is authorized to refuse and the *de novo* review power set out in s. 49 is exhausted. [Emphasis in original.]

B. *General Interpretive Principles*

20 This is not the first time that this Court has been called upon to resolve a conflict between the *Access Act* and the *Privacy Act*. In *Dagg*, *supra*, this Court was similarly required to determine whether certain information requested was "personal information" as defined in the *Privacy Act*. More particularly, the Court had to determine whether copies of logs with the names, identification numbers and signatures of employees entering and leaving the workplace on weekends is information that "relates to the position or functions of the individual", as defined in the exception set out in s. 3(*j*) of the *Privacy Act*.

21 The majority of the Court agreed with La Forest J., when he provided a detailed description of the interpretive principles applicable in a case of conflict between those two statutes. I will not repeat that analysis. However, I wish to recall the main principles that must guide courts in their application of the two enactments. First, it is clear that the *Privacy Act* and the *Access Act* have to be read jointly and that neither takes precedence over the other. The statement in s. 2 of the *Access Act* that exceptions to access should be "limited and specific" does not create a presumption in favour of access. Section 2 provides simply that the exceptions to access are limited and that it is incumbent on the federal institution to establish that the information falls within one of the exceptions (see also s. 48 of the *Access Act*).

22 Further, I note that s. 4(1) of the *Access Act* states that the right to government information is "[s]ubject to this Act". Section 19(1) of the *Access Act* expressly prohibits the disclosure of a record that contains personal information "as defined in section 3 of the *Privacy Act*". Thus, s. 19(1) excludes "personal information", as defined in the *Privacy Act*, from the general access rule. The *Access Act* and the *Privacy Act* are a seamless code with complementary provisions that can and should be interpreted harmoniously.

C. *Does the Requested Document Contain "Personal Information"?*

23 The *Access Act* provides a general right to access, subject to certain exceptions, such as that in s. 19(1), which prohibits the disclosure of a record that contains personal information "as defined in section 3 of the *Privacy Act*". As its name indicates, the *Privacy Act* protects the privacy of individuals with respect to personal information about themselves held by government institutions. By defining "personal information" as "information about an identifiable individual that is recorded in any form including . . .", Parliament defined this concept broadly. In *Dagg*, *supra*, La Forest J. commented on the definition of "personal information" at paras. 68-69:

> On a plain reading, this definition is undeniably expansive. Notably, it expressly states that the list of specific examples that follows the general definition is not intended to limit the scope of the former. As this Court has recently held, this phraseology indicates that the

> general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition; see *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at pp. 289-91. Consequently, if a government record is captured by those opening words, it does not matter that it does not fall within any of the specific examples.
>
> As noted by Jerome A.C.J. in *Canada (Information Commissioner) v. Canada (Solicitor General)*, *supra*, at p. 557, the language of this section is "deliberately broad" and "entirely consistent with the great pains that have been taken to safeguard individual identity". Its intent seems to be to capture any information about a specific person, subject only to specific exceptions. [Emphasis in original.]

24 It seems fairly clear that the information sought regarding the four RCMP members is "information about an identifiable individual", and therefore "personal information" within the meaning of s. 3. Indeed, this much was apparently agreed to by the parties. Generally, once it is determined that the information requested falls within the opening words of the definition of "personal information" in s. 3 of the *Privacy Act*, it is not necessary to consider whether it is also encompassed by one of the specific, non-exhaustive examples set out in paras. (*a*) to (*i*). However, considering that the dispute in this case concerns the relationship between "employment history" (which is protected as an example of "personal information" in s. 3(*b*)) and the exception to "personal information" set out in s. 3(*j*), it is essential to determine the meaning of "employment history". I will then go on to consider whether the information in dispute is related to employment history.

25 In my view, there is no reason to limit the scope of the expression "employment history" to particular aspects of employment or to modify its usual meaning. Parliament referred broadly to "employment history" and did not qualify that expression. There is no evidence of an intent to limit its meaning. Further, the wording of s. 3(*b*) suggests that it has a broad scope. Indeed, the provision does not state that personal information includes "employment history" itself. Rather, it stipulates that it includes "information relating to . . . employment history" (emphasis added). *Black's Law Dictionary* (6th ed. 1990) defines the word "relate" at p. 1288 as "to bring into association with or connection with". The wording of the French version of s. 3(*b*) is equally general: "*Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, . . . relatifs à . . . ses antécédents professionnels* . . ." (emphasis added). The *Dictionnaire de droit québécois et canadien* (2nd ed. 2001) defines "*relatif*" at p. 477 as "*[q]ui concerne, qui se rapporte à*". Considering the wording of the provision, it would seem that the personal information referred to is that relating to employment history. In the absence of clear legislative intent to the contrary, the ordinary meaning of the legislative provision must prevail. The ordinary meaning of "employment history" includes not only the list of positions previously held, places of employment, tasks performed and so on, but also, for example, any personal evaluations an employee might have received during his career. Such a broad definition is also consistent with the meaning generally given to that expression in the workplace.

26 This definition of "employment history" is consistent with the objectives of the *Privacy Act*. Indeed, that statute has as its aim the protection of information relating to individual identity (as is necessary in a democratic country such as ours), subject to specific exceptions. Recently, in *Lavigne v. Canada (Office of the Commissioner of Official Languages)*, [2002] 2 S.C.R. 773, 2002 SCC 53, I wrote extensively on the importance of the right to privacy, characterizing the *Privacy Act* as quasi-constitutional. Parliament set out s. 3 of the *Privacy Act* in very broad language, and it is not for this Court to limit the scope of that section. This point was recognized by this Court in *Dagg*, *supra*, at paras. 68 and 69. In the case at bar, there is no doubt that the requested information relates to "employment history" within the meaning of s. 3(*b*) of the *Privacy Act*. Indeed, the information requested — a chronological list of the members' postings, their years of service, and their anniversary dates of service — is exactly the type of information that a reasonable person in a working environment would likely characterize as "employment history". In fact, the parties agree to such a characterization. As such, the information falls within the scope of s. 3(*b*).

D. *Is the Requested Information Excluded from the Definition of "Personal Information" by Virtue of Section 3(j) of the Privacy Act?*

27 The appellant submits that even if the information he requested is *prima facie* "personal information", it falls under the exemption provided in s. 3(*j*) of the *Privacy Act*. That provision states:

> **3.** . . .
>
> "personal information" . . .
>
> . . . does not include
>
> (*j*) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,
>
> (i) the fact that the individual is or was an officer or employee of the government institution,

> (ii) the title, business address and telephone number of the individual,
>
> (iii) the classification, salary range and responsibilities of the position held by the individual,
>
> (iv) the name of the individual on a document prepared by the individual in the course of employment, and
>
> (v) the personal opinions or views of the individual given in the course of employment.

Specifically, the appellant contends that the information requested pertains to the RCMP members' positions, and therefore falls within the general opening words of (*j*) which, according to him, is not limited to current employment. In his view, this subsection is retroactive in its application to information that relates to the past positions or functions of a federal officer or employee.

1. The Retroactive Nature of Section 3(*j*)

28 Cullen J. declined to extend the scope of s. 3(*j*) to past postings of the RCMP members. According to him, if this section were to be given a retrospective bearing, "there would be little left to contemplate in private and little meaning to the protection of employment history given by s. 3 (*b*)" (para. 24).

29 With respect, I see no reason to impose a time restriction on the scope of s. 3(*j*). First, the wording itself makes reference to "information about an individual who is or was an officer or employee of a government institution . . ." (emphasis added). It therefore invokes a certain retroactivity. As well, s. 3(*j*)(i) mentions expressly that personal information does not include "the fact that the individual is or was an officer or employee of the government institution" (emphasis added). Furthermore, I note that the examples given in this section are not exhaustive and do not reduce the general scope of the introductory phrase. Parliament has clearly expressed its intention that the introductory phrase keep its wide and general meaning by providing only non-exhaustive examples. It uses the expression

"including" or "*notamment*" in the French version. I had the opportunity in *Lavigne*, *supra*, to express the following comments regarding the meaning of that expression in the context of the application of the *Privacy Act*, at para. 53:

> Parliament made it plain that s. 22(1)(*b*) retains its broad and general meaning by providing a non-exhaustive list of examples. It uses the word "*notamment*", in the French version, to make it plain that the examples given are listed only for clarification, and do not operate to restrict the general scope of the introductory phrase. The English version of the provision is also plain. Parliament introduces the list of examples with the expression "without restricting the generality of the foregoing". This Court has had occasion in the past to examine the interpretation of the expression "without restricting the generality of the foregoing" in similar circumstances: in *Dagg*, *supra*, at para. 68, La Forest J. analyzed s. 3 of the *Privacy Act*, the wording of which resembles the wording of s. 22(1)(*b*) of that Act:
>
> > In its opening paragraph, the provision states that "personal information" means "information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing". On a plain reading, this definition is undeniably expansive. Notably, it expressly states that the list of specific examples that follows the general definition is not intended to limit the scope of the former. As this Court has recently held, this phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition; see *Schwartz v. Canada*, [1996] 1 S.C.R. 254, at pp. 289-91.

Thus, the list of examples provided in s. 3(*j*) is not exhaustive, and certainly does not limit the application of the introductory paragraph to the current position held by an employee or to the last position occupied by an employee now retired. The purpose of s. 3(*j*) is to ensure that the state and its agents are held accountable to the general public. Given the lack of any indication that Parliament intended to incorporate such a limitation into the legislation, the fact that a public servant has been promoted or has retired should not affect the extent to which she or he is held accountable for past conduct.

30 Finally, I note that some might be tempted to view use of the word "position" in the singular in s. 3(*j*) as an indication of Parliamentary intent to limit the scope of s. 3(*j*) to the position currently held by an employee. Like Cullen J., I am of the opinion that this word should be understood

as including the plural. It would be absurd for instance that a person requesting information could only obtain information about a single position where a federal employee holds two positions simultaneously. There is nothing to justify an interpretation that would lead to such a result. Thus, the word "position" as it appears in s. 3(*j*) should be read as applicable to multiple positions. Information that would have been available at the time that the individual held a certain position or exercised certain functions remains available subsequent to that individual's promotion or retirement.

31 The Federal Court of Appeal agreed that s. 3(*j*) applies equally to past and current positions. However, the court added that a request about a named individual's position, especially in respect of past positions held, has to be specific as to time, scope and place. Létourneau J.A. explained that it cannot be a "fishing expedition" about all or numerous positions occupied by an individual over the span of his or her employment, because this would empty the meaning of s. 3(*b*), which prevents access to "employment history".

32 With respect, I view this interpretation as unnecessarily restrictive and without sufficient legal foundation. The Court of Appeal's approach fails to recognize that it is the nature of the information itself that is relevant – not the purpose or nature of the request. The *Privacy Act* defines "personal information" without regard to the intention of the person requesting the information. Similarly, s. 4(1) of the *Access Act* provides that every Canadian citizen and permanent resident "has a right to and shall, on request, be given access to any record under the control of a government institution". This right is not qualified; the *Access Act* does not confer on the heads of government institutions the power to take into account the identity of the applicant or the purposes underlying a request. In short, it is not open to the RCMP Commissioner to refuse disclosure on the grounds that disclosing the information, in this instance, will not promote accountability; the *Access Act* makes this information equally available to each member of the public because it is thought that the availability of such information, as a general matter, is necessary to ensure the accountability of the state and to promote the capacity of the citizenry to participate in decision-making processes. The interpretation suggested by the Court of Appeal leads to the curious result that whether requested information related to past positions held by a federal employee is considered to be "personal information" will depend on the precision with which the request is made. Take for instance the situation where an individual wants to know if Mr. X was an employee between 1990 and 1996 and formulates a request in broad terms. If we apply the test suggested by the Court of Appeal, the request will likely be refused. However, if another individual wants the same information about Mr. X, and divides his request into three separate requests spread out over several months, he will likely succeed in obtaining the information. The Court of Appeal recognized at para. 22 the difficulties of applying such a test:

> Therefore, for example, a citizen could properly ask whether John Doe worked for the Department of Justice in 1994, what position he held at that time, the duties and responsibilities of that position and where he exercised his functions. But he could not, without being properly opposed paragraph 3(*b*), request information about John Doe's positions in the government between 1980 and 1994. Of course, between these two clear extremes there is a wide variety of requests about a named individual's position which may be more or less specific and which would have to be addressed on their own merits in order to determine whether they fall into the principle of non disclosure or the exception.

[Emphasis added.]

33 In my opinion, it is impossible to justify an approach that results in two people requesting the same information from the same federal institution obtaining different responses. Such an interpretation leads to an inequitable result and is incompatible with the objectives of the *Privacy Act*. The *Privacy Act* defines "personal information" in a permanent manner. A particular class of information either is or is not personal information. The purpose or motive of the request is wholly irrelevant. The strategy used by the person filing a request cannot modify the nature of the requested information.

34 By way of explanation of his approach, Létourneau J.A. for the Court of Appeal stated that he did not want to adopt an interpretation "which, in the end, will or is likely to empty the definition of 'personal information' of its contents with respect to 'employment history'" (para. 20). While this is a valid concern, an interpretation of s. 3(*j*) that includes past positions without regard to the formulation of the request does not empty the definition of "employment history". Section 3(*j*) applies only to an "individual who is or was an officer or employee of a government institution", and only for the purposes of ss. 7, 8 and 26 and s. 19 of the *Access Act*. In contrast, s. 3(*b*) is of general application. Parliament has therefore chosen to give less protection to the privacy of federal employees when the information requested relates to their position or functions. It follows that if a federal institution has in its possession the employment history of an individual who has never worked for the federal government, that information remains confidential, whereas federal employees will see the information relating to their position and functions released. Section 3(*b*) therefore has a wider scope, as it applies to every "identifiable individual", and not just individuals who are or were officers or employees of a government institution.

35 Further, only information relating to the position or functions of the concerned federal employee or falling within one of the examples given is excluded from the definition of "personal information". A considerable amount of information that qualifies as "employment history" remains inaccessible, such as the evaluations and performance reviews of a federal employee, and notes taken during an interview. Indeed, those evaluations are not information about an officer or employee of a government institution that relates to the position or functions of the individual, but are linked instead to the competence of the employee to fulfil his task. Clearly, there are aspects of employment history that are not related to functions or past positions. Therefore, to accept that s. 3(*j*) authorizes the communication of information that relates to both current and past positions and functions of federal officers and employees, without regard to the formulation of the request, does not empty the definition of "employment history" of meaning.

2. The Applicable Test for Section 3(*j*) of the *Privacy Act*

36 The appellant submits that this Court has developed a test for the application of s. 3(*j*) that distinguishes between subjective and objective information. He explains that test in the following terms:

> Any subjective or evaluative information about a public official's employment history will fall within paragraph 3(*b*). However, where the information requested is objective or factual in nature, the Court in *Dagg* found that the information falls within the exception set out in paragraph 3(*j*) and, hence, does not qualify for exemption under subsection 19(1) of the *Access to Information Act*. [Emphasis added.]

He bases his interpretation on the following statement by Cory J. in *Dagg*, *supra*, at para. 12:

> In my view, there is neither a subjective aspect nor an element of evaluation contained in a record of an individual's presence at the workplace beyond normal working hours. Rather, that record discloses information generic to the position itself.

The appellant thus submits that the RCMP Commissioner ought to disclose the information sought to the Information Commissioner, because it is objective and factual information that relates to the RCMP members' positions or functions. I cannot agree that this is the proper basis for requiring the RCMP to disclose the information in question.

37 In my opinion, the appellant has mischaracterized this Court's reasons in *Dagg*. *Dagg* does not stand for the proposition that objective and factual information that relates to the position or functions of the individual is to be provided to the public, while subjective or evaluative information that relates to the position or functions of the individuals is protected by the *Privacy Act*. Indeed, such an interpretation is contrary to this Court's reasons in *Dagg*. As the passage quoted above indicates, the reason that the names and identification numbers on the sign-in logs were disclosed is not because the information contained therein was objective and factual, but because the Court regarded it as "information 'that relates to' the position or function of the individual, and thus falls under the opening words of s. 3(*j*)" (*Dagg*, *supra*, at para. 8).

38 As I explained above, the examples mentioned in s. 3(*j*) are not exhaustive. However, s. 3 (*j*) does have a specified scope, as the information must be related to the position or functions held by a federal employee. For instance, in *Canada (Information Commissioner) v. Canada (Solicitor General)*, [1988] 3 F.C. 551 (T.D.), Jerome A.C.J. held that certain opinions expressed about the training, personality, experience or competence of individual employees did not fall under s. 3(*j*). Such information is not a direct function of the individual's position — rather, it concerns the competence and

characteristics of the employee. Section 3(*j*) should apply only when the information requested is sufficiently related to the general characteristics associated with the position or functions held by an officer or employee of a federal institution. As La Forest J. explained in *Dagg*, *supra*, at para. 95:

> Generally speaking, information relating to the position, function or responsibilities of an individual will consist of the kind of information disclosed in a job description. It will comprise the terms and conditions associated with a particular position, including such information as qualifications, duties, responsibilities, hours of work and salary range.

Obviously, a request that relates to the past or present position of a federal employee is necessarily about an individual. Given that "personal information" is defined in s. 3 of the *Privacy Act* as information "about an identifiable individual", and given that s. 3(*j*) is, after all, an exception to the manner in which "personal information" generally is treated, it follows that s. 3(*j*) must contemplate information about an individual. In my opinion, it is both artificial and unhelpful to attempt to distinguish between "information about the person" and "information about the position or functions". Section 3(*j*) applies when the information — which is always linked to an individual — is directly related to the general characteristics associated with the position or functions held by an employee, without the objective or subjective nature of that information being determinative.

39 In my opinion, (1) the list of the RCMP members' historical postings, their status and date; (2) the list of ranks, and the dates they achieved those ranks; (3) their years of service; and (4) their anniversary dates of service, are all elements that relate to the general characteristics associated with the position or functions of an RCMP member. They do not reveal anything about their competence or divulge any personal opinion given outside the course of employment – rather, they provide information relevant to understanding the functions they perform. Put another way, the aspects of employment described above shed light on the general attributes of the position and functions of an RCMP member.

VI. Conclusion

40 For these reasons, I would allow the appeal, set aside the judgments below, and order the RCMP Commissioner to disclose to the appellant the following information with respect to the four RCMP officers, Robert Shedden, Kenneth Craig, Bob Zimmerman and Larry Ronald Wendell:

(1) the list of historical postings, their status and date;

(2) the list of ranks, and the dates they achieved those ranks;

(3) their years of service; and

(4) their anniversary date of service.

41 Costs are awarded to the appellant throughout.

Appeal allowed with costs.

Solicitor for the appellant: Office of the Information Commissioner of Canada, Ottawa.

Solicitor for the respondent: Deputy Attorney General of Canada, Ottawa.

Solicitors for the intervener: Nelligan O'Brien Payne, Ottawa.